OAH 8-2200-22910-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules of the Minnesota Pollution Control Agency Governing Permits for Greenhouse Gas Emissions, *Minnesota Rules* Chapters 7005, 7007 and 7011

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Manuel J. Cervantes for a rulemaking hearing on August 30, 2012. The public hearing was held in the Boardroom of the Minnesota Pollution Control Agency's offices in Saint Paul, Minnesota.

The Minnesota Pollution Control Agency (MPCA or Agency) proposes to amend its permitting rules so as to align them with recent federal Greenhouse Gases (GHG) permit thresholds. The MPCA also proposes to adopt a recent federal New Source Performance Standard (NSPS) that applies to Stationary Spark Ignition Internal Combustion Engines. Lastly, the MPCA proposes to revise existing requirements so as to make clear that Minnesota's air emissions permitting requirements apply to all owners and operators of air emission sources.[1]

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.[2] The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The agency must establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.[3]

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[1] Ex. 3 at 2 (Statement of Need and Reasonableness – "SONAR").

[2] *See,* Minn. Stat. §§ 14.131 through 14.20.

[3] Minn. Stat. §§ 14.05, 14.131, 14.23 and 14.25.

The agency panel at the public hearing included Barbara Jean Conti (MPCA Air Quality Technical Staff), Nathan Cooley (MPCA Rules Coordinator) and Frank Kohlasch (Environmental Analysis and Outreach Section Manager).[4]

Approximately eighteen people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Seven members of the public made statements or asked questions during the hearing.[5]

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until September 19, 2012 – to permit interested persons and the Agency to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the Agency an opportunity to reply to earlier-submitted comments.[6] The hearing record closed on September 26, 2012.

On October 25, 2012, the Chief Administrative Law Judge granted an extension of the time to complete this report until Friday, November 9, 2012.[7] In that same Order, he reassigned this matter to the undersigned Administrative Law Judge and adjusted the docket number to OAH 8-2200-22910-1 so as to reflect this change in assignment.

SUMMARY OF CONCLUSIONS

The Agency has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are needed and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Regulatory Background to the Proposed Rules

1. Under the Clean Air Act (CAA),[8] air emission permitting authorities issue air emission permits to large stationary sources of air pollutants. Under the CAA, owners and operators of stationary sources must obtain these federal permits if the source's potential to emit specified pollutants during construction, modification or operation of the source exceeds established emission thresholds. The CAA requires

[4] *Hearing Transcript,* at 2 (August 30, 2012).

[5] *Hearing* Roster, at 1 – 3; Hearing *Transcript,* at 3 (August 30, 2012).

[6] *See,* Minn. Stat. § 14.15, subd. 1.

[7] Minn. Stat. § 14.15, subd. 2.

[8] 42 U.S.C. §§ 7401 – 7671q.

federal permits if potential emissions of any one of the designated pollutants exceed levels established by the U.S. Environmental Protection Agency (EPA).[9]

2. On April 2, 2007, the U.S. Supreme Court found that GHGs are air pollutants under CAA section 302(g). As a result, the Supreme Court found that EPA was required to determine, under CAA section 202(a), whether: (1) GHGs from new motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare, or (2) the science is too uncertain to make a reasoned decision.[10]

3. After issuing a proposal and receiving comment, the EPA Administrator determined that the current and projected atmospheric concentrations of six GHGs — CO2, CH4, N2O, HFCs, PFCs, and SF6 — are reasonably anticipated to endanger the public health and welfare of current and future generations.[11]

4. The Administrator's "endangerment and contribution findings" then prompted the EPA to issue additional standards under section 202(a) of the Clean Air Act that were ''applicable to emission'' of the pollutants "that endanger[ ] public health and welfare."[12]

5. The permitting process for a permit to construct or modify an emission source – known as New Source Review (NSR) – has two parts. Nonattainment NSR applies to sources that emit specified pollutants in a part of the country that does not now meet the National Ambient Air Quality Standards (NAAQS) for those pollutants. Prevention of Significant Deterioration (PSD) is designed to guard against changes to existing air emission sources, or the construction of new sources, that would degrade air quality in areas that do attain all of the National Ambient Air Quality Standards.[13]

6. The process for obtaining a permit to operate a pollution source that exceeds established emission thresholds is known alternatively as the "Title V" or "Part 70" program. Title V of the CAA Amendments of 1990 requires that all major stationary sources of air pollutants obtain a permit to operate. The regulations implementing this statute are found in Part 70 of Title 40 of the Code of Federal Regulations.[14]

7. The EPA grants authority to the states to operate both the NSR and Part 70 programs.[15]

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[9] Ex. 3 at 6 (SONAR).

[10] *See, Massachusetts v. EPA*, 549 U.S. 497 (2007); 75 *Federal Register* 31514, 31519 (June 3, 2010).

[11] *See,* 74 *Federal Register* 66496 (December 15, 2009); 36 *State Register* 210 (August 29, 2011).

[12] 75 *Federal Register* 31514, 31519.

[13] Ex. 3 at 6 (SONAR); *see also,* 40 C.F.R. Part 70.

[14] Ex. 3 at 6 (SONAR).

[15] *Id*.

8. With respect to construction permits, Minnesota administers the PSD program as a "delegated" state – issuing permits on behalf of the EPA and according to procedures set forth 40 C.F.R. § 52.21.[16]

9. With respect to operating permits, EPA has determined that Minnesota's Part 70 program is at least as stringent as the parallel federal program. Accordingly, the EPA has authorized the MPCA to implement its own Part 70 operating permit program.[17]

10. Likewise important, under Minnesota's combined permitting program, the Agency issues a single permit which authorizes both construction and later operation of emission sources.[18]

11. In June of 2010, the EPA promulgated administrative rules that provided that GHGs are subject to permitting requirements under air emission permits issued on or after January 2, 2011. Starting on January 2, 2011, new or modified sources that were subject to Part 70 or PSD under the prior rules must address GHGs in their permits if their GHG emissions met or exceeded federally-specified thresholds. Starting July 1, 2011, new, modified and existing facilities were subject to the new thresholds.[19]

12. Sources that burn fossil fuels are the principal source of GHG emissions. Sources using plant materials as fuel, or that use a fermentation process, also emit "biogenic" carbon dioxide (CO2) – which is a greenhouse gas.[20]

13. Prior to the EPA's 2010 rulemaking, GHGs were not regulated pollutants and were not included in the pollutants assessed for purposes of determining whether emission sources required air emissions permits.[21]

14. Under Part 70 and PSD rules, a "major source" air emission permit is required when potential emissions are either 100 Tons Per Year or 250 Tons Per Year ("TPY"), depending upon the source type. When greenhouse cases are included as "regulated pollutants" under these thresholds, many small sources of pollutants – such as residences, schools, hospitals, restaurants and apartment buildings – would be required to obtain a permit as a "major source."[22]

15. For this reason, in 2010, EPA promulgated generous exemption thresholds, or "tailoring" regulations, which excluded smaller sources of greenhouse gas emission from the permitting requirements. In EPA's view, without such "tailoring

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[16] *Id*.

[17] *Id.*

[18] *Id*.

[19] *Id*; *see also,* 75 *Federal Register* 25324 (May 10, 2010); 75 *Federal Register* 31514.

[20] Ex. 3 at 7 (SONAR); 75 *Federal Register* 31514, 31519.

[21] Ex. 3 at 6 (SONAR).

[22] *Id.,* at 9 (SONAR).

regulations," application of the lower TPY levels to GHGs would be contrary to Congressional intent, overwhelm state permitting authorities and "bring the Title V permitting process to a standstill." As the EPA explained:

> [I]f title V were to apply to GHG sources at the 100 tpy level, until EPA could develop streamlining methods, all of these sources newly subject to title V would need to apply for permits. We estimate that the commercial and residential sources would incur, on average, expenses of $23,175, while an industrial source would incur expenses of $46,350, to prepare a permit application and receive a permit. The great majority of these sources would be small commercial and residential sources of the type that Congress did not expect would be included in title V. For example, as discussed above, the legislative history of title V, including both the permit program under CAA sections 501-506 and the "small business stationary source technical and environmental compliance assistance program" under CAA section 507, indicated that Congress did not expect that "printers, furniture makers, dry cleaners, and millions of other small businesses" would become subject to title V. House Committee Report, H.R. 101-590, at 354. These sources generally do not have the potential to emit conventional pollutants at or above the 100 tpy threshold. [46] However, many do have the potential to emit GHGs above that threshold. Many printers and furniture makers use a variety of combustion equipment that has the potential to emit at least 100 tpy CO_2, and many commercial dry cleaners have gas-fired driers that have the potential to emit at least 100 tpy of CO_2. All told, there are in fact "millions of * * * small businesses" that would become subject to title V—of the 6.1 million sources that would become subject to title V, the great majority are small businesses—if the title V applicability provisions are applied literally to GHG sources.
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> Moreover, the overall cost to all 6.1 million sources — before the development of streamlining methods — would be a staggering $49 billion per year over a 3 year period. Imposing burdens of this magnitude on these sources — individually and in total — would of course be contrary to Congress's efforts to minimize the expenses of title V, especially to small sources. The magnitude of the costs is, in a sense, heightened because a great many of these sources will not have applicable requirements to include in their permits; therefore, much of the costs will produce relatively little benefit.
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> Yet, the most important reason why applying the title V program to GHG sources without tailoring, and before the development of streamlining methods, would be inconsistent with congressional intent, is that the resulting program would prove unadministrable. Adding some 6.1 million permit applications to the 14,700 that permitting authorities now

handle would completely overwhelm permitting authorities, and for all practical purposes, bring the title V permitting process to a standstill.[23]

16. The MPCA promulgated a series of regulations that conformed to the federal changes by way of the Good Cause Exemption rulemaking process. Under that process, the rules promulgated in 2010 are slated to expire in January of 2013. This rulemaking is undertaken to establish permanent rules for administration of the emission permitting programs after the expiration date of the temporary regulations.[24]

17. In the proposed rules, the Agency incorporates the EPA's GHG-related definitions and permit thresholds.[25]

II. Rulemaking Authority

18. The Agency cites Minn. Stat. §§ 116.07, subd. 4 (a) as its source of statutory authority for these proposed rules. This statute grants the Agency authority to "adopt, amend and rescind rules and standards … for the prevention, abatement, or control of air pollution." The statute further provides that "[w]ithout limitation, rules or standards may relate to sources or emissions of air contamination or air pollution, to the quality or composition of such emissions, or to the quality of or composition of the ambient air or outdoor atmosphere or to any other matter relevant to the prevention, abatement, or control of air pollution."[26]

19. The Administrative Law Judge concludes that the Agency has the statutory authority to adopt rules governing the permitting and operation of pollution emitting sources within Minnesota.

III. Procedural Requirements of Chapter 14

A. Publications

20. On August 29, 2011, the Agency published in the *State Register* a Request for Comments seeking comments on whether the Temporary Rules promulgated in January of 2011 should be made permanent.[27]

21. On June 25, 2012, the Agency requested approval of its Notice of Intent to Adopt Rules With or Without a Hearing (Dual Notice), Additional Notice Plan and asked for permission to omit the text of the proposed rule changes in the *State Register*.[28]

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[23] 75 *Federal Register* 31514, 31563.

[24] *Id.,* at 19 (SONAR). *See also,* Minn. Stat. § 14.388, subdivision 1, clause 2.

[25] *Id.,* at 2, 19, 20, 26, 27 and 37 (SONAR).

[26] Minn. Stat. § 116.07, subd. 4 (a).

[27] 36 *State Register* 210 (August 29, 2011).

[28] Ex. 9.

22. By way of a letter dated July 2, 2012, Administrative Law Judge Manuel J. Cervantes approved the Agency's Dual Notice and Additional Notice Plan.[29]

23. By way of a letter dated July 2, 2012, Chief Administrative Law Judge Raymond R. Krause approved the approved the Agency's request to omit the text of the proposed rule changes in the *State Register*.[30]

24. The Dual Notice of Intent to Adopt Rules, published in the July 9, 2012 *State Register*, set August 10, 2012 as the deadline for comments or to request a hearing.[31]

25. On July 9, 2012, the Agency mailed a copy of the Dual Notice of Hearing to all persons and associations who had registered their names with the Agency for the purpose of receiving such notice and to all persons and associations identified in the additional notice plan.[32]

26. On July 6, 2012, the Agency mailed a copy of the Dual Notice and the statement of need and reasonableness to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over environmental regulation.[33]

27. On July 6, 2012, the Agency mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23.[34]

28. The Notice of Hearing identified the date and location of the hearing in this matter.[35]

29. At the hearing on August 30, 2012, the Agency filed copies of the following documents as required by Minn. R. 1400.2220:

a. the Agency's Request for Comments as published in the *State Register* on August 29, 2011;[36]

b. the proposed rules dated April 26, 2012, including the Revisor's approval;[37]

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[29] *Id*.

[30] *Id*.

[31] Ex. 5.

[32] Ex. 6 and 7.

[33] Ex. 10.

[34] Ex. 4.

[35] Ex. 5.

[36] Ex. 9.

[37] Ex. 2.

c. the Agency's Statement of Need and Reasonableness (SONAR);[38]

d. the Certificate of Mailing the SONAR to the Legislative Reference Library on July 6, 2012;[39]

e. the Dual Notice as mailed and as published in the *State Register* on July 9, 2012;[40]

f. the Certificate of Mailing the Dual Notice to the rulemaking mailing list on July 9, 2012, and the Certificate of Accuracy of the Mailing List;[41]

g. the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on July 9, 2012;[42]

h. the written comments on the proposed rules that the Agency received during the comment period that followed the Dual Notice;[43]

i. the Certificate of Sending the Dual Notice and the Statement of Need and Reasonableness to Legislators on July 6, 2012;[44] and,

j. an August 21, 2012 memorandum from Minnesota Management and Budget.[45]

B. Additional Notice Requirements

30. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

31. On July 9, 2012, the Agency provided the Dual Notice of Intent to Adopt in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

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[38] Ex. 3.

[39] Ex. 4.

[40] Ex. 5.

[41] Ex. 6.

[42] Ex. 7.

[43] Ex. 8.

[44] Ex. 10.

[45] Ex. 11.

- The Dual Notice of Intent to Adopt Rules was posted on the Agency's website (on the "public notice," "tailoring rule," "air permitting" and "GHG application" pages of the website) and the Agency has maintained these materials continuously since they were posted.[46]

- Notice of the rulemaking was sent by first class mail to its agency rulemaking list, holders of "capped permits" and recipients of "Emission Inventory" forms from the Agency.[47]

- A copy of the Dual Notice of Intent to Adopt was sent by Electronic Mail to permit holders for whom the Agency had valid electronic mail addresses and subscribers to the Agency's "Air Quality Listserve distribution list."[48]

- Agency staff included notice of the rulemaking in a number of public presentations that they made to stakeholders.[49]

C. Notice Practice

1. Notice to Stakeholders

32. On July 9, 2012, the Agency provided a copy of the Dual Notice of Intent to Adopt to its official rulemaking list (maintained under Minn. Stat. § 14.14), and to stakeholders identified in its additional notice plan.[50]

33. The comment period on the proposed rules expired at 4:30 p.m. on August 10, 2012.[51]

34. There are 32 days between July 9, 2012 and August 10, 2012.

35. The Administrative Law Judge concludes that the Agency did not fulfill its responsibilities, under Minn. R. 1400.2080, subpart 6, to mail the Dual Notice "at least 33 days before the end of the comment period …."

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[46] Ex. 3 at 15-16 (SONAR).

[47] *Id*.

[48] *Id*.

[49] *Id*.

[50] Ex. 6.

[51] Ex. 5 at 1.

2. Notice to Legislators

36. On July 6, 2012, the Agency sent a copy of the Notice of Hearing and the Statement of Need and Reasonableness to Legislators as required by Minn. Stat. § 14.116.[52]

37. Minn. Stat. § 14.116 requires the agency to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators on the same date that it mails its Notice of Intent to Adopt to persons on its rulemaking list and pursuant to its additional notice plan.

38. The Administrative Law Judge concludes that the Agency did fulfill its responsibilities, to mail the Dual Notice "at least 33 days before the end of the comment period …."

3. Notice to the Legislative Reference Library

39. On July 6, 2012, the Agency mailed a copy of the SONAR to the Legislative Reference Library.[53]

40. Minn. Stat. § 14.23 requires the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

41. The Administrative Law Judge concludes that the Agency did fulfill its responsibilities, to mail the Dual Notice "at least 33 days before the end of the comment period …."

4. Assessment of the Agency's Notice Practice

42. Minn. Stat. § 14.15, subd. 5 requires an administrative law judge to disregard an error or defect in the proceeding due to an "agency's failure to satisfy any procedural requirement" if the administrative law judge finds "that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process . . . ."

43. The Agency failed to dispatch the Dual Notice sufficiently in advance of the publication of that Notice in the *State Register*. However, the Administrative Law Judge concludes that the Agency's late mailings did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. In this context, it is important to emphasize that the Board sent a copy of the Dual Notice to nearly 1,400 interested persons and that more than 25 people later requested a hearing on these rules.[54] The vigorous notice plan and the fact that a hearing was later scheduled

[52] Ex. 10.

[53] Ex. 4.

[54] Exs. 6 and 7.

mitigate the impacts of a defective filing. For those reasons, these procedural errors were harmless errors under Minn. Stat. § 14.15, subd. 5 (1).

D. Impact on Farming Operations

44. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

45. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Agency was not required to notify the Commissioner of Agriculture.

E. Statutory Requirements for the SONAR

46. The Administrative Procedure Act obliges an agency adopting rules to address seven factors in its Statement of Need and Reasonableness.[55] Those factors are:

> (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
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> (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
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> (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
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> (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
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> (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
>
> (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable

[55] Minn. Stat. § 14.131.

categories of affected parties, such as separate classes of government units, businesses, or individuals; and

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

1. The Agency's Regulatory Analysis

(a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.

47. The Agency asserts that three key categories of Minnesotans will benefit from aligning the state's air quality rules with the federal "tailoring rules." They are: (a) the many thousands of businesses and residences that would otherwise be obliged to obtain a "major source" permit, if the rules were not aligned; (b) the MPCA, which will be saved resources by not reviewing and acting upon a very sharp rise in permit applications; and (c) the general public, because of the incentives that the proposed rules make for implementing energy efficient technologies.[56]

48. As noted above, under Part 70 and PSD rules, a "major source" air emission permit is required when potential emissions are 100 Tons Per Year or 250 Tons Per Year ("TPY"), depending upon the source type. Under the proposed rules, owners and operators of sources with the potential to emit 100 or 250 TPY of GHGs are relieved of the obligation to obtain a permit to address their GHG emissions. These rules would obligate owners and operators of sources with the potential to emit more than 100,000 TPY of GHG to address GHGs in their air emissions permits. Additionally, owners and operators of sources with biogenic CO_2 emissions will gain a deferral from including those emissions in their calculation of potential emissions for purposes of determining whether their GHG emissions exceed the permitting threshold.[57]

49. The agency estimates that without these rules, approximately 120,000 sources that do not hold an emissions permit would be required to obtain a permit.[58]

50. Going forward, the Agency projects that owners and operators will implement energy efficiency measures, so as to reduce their GHG emissions and maintain their status as minor sources of GHGs. Energy efficiency benefits the public by reducing the amount of energy used, the volume of pollutants emitted and the pulmonary and coronary impacts from ozone and particulate matter in the air.[59]

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[56] Ex. 3 at 9 (SONAR).

[57] *Id*.

[58] *Id.,* at 10 (SONAR).

[59] *Id.,* at 9 (SONAR).

(b) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.

51. The Agency does not project that implementation and enforcement of the proposed rules will result in additional costs to the Agency or any other state agency. This is because the Agency's permitting program is, by and large, self-funding through fee revenue; and adoption of the proposed rule would maintain the present alignment between the number of permit applications, fee revenue and the agency resources needed to process those applications.[60]

(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.

52. The Agency asserts that the proposed rules represent significant regulatory relief, and fewer compliance costs, to Minnesota homes and businesses that otherwise would be obliged to obtain an emission permit. The Agency does acknowledge that as a result of a change in the applicable regulation some permit current permit holders would be obliged to modify their current permit, but that this impact is very modest in comparison to the program as a whole.[61]

(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

53. Because a key objective of the proposed rules is to avoid a reading of Part 7007 that would necessitate issuing approximately 120,000 new emission-related permits, the Agency could not identify methods other than rulemaking to provide the recommended regulatory relief.[62]

(e) The probable costs of complying with the proposed rules.

54. As noted above, MPCA estimates that a small number of existing sources will need to obtain an air emission permit for the first time as a result of these rules and that a few sources will have to change their permit category or modify their permit to take into account new permit limits.[63]

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[60] *Id.,* at 10 (SONAR).

[61] *Id*.

[62] *Id*.

[63] *Id*.

(f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

55. If the MPCA did not make the existing, temporary, GHG permit thresholds permanent, it would require the Agency to issue permits to sources that emitted either 100 or 250 TPY of GHGs. This regulatory change would designate approximately 120,000 facilities as major sources under PSD or Part 70. The agency estimates the compliance costs for these newly captured sources at $3.872 billion during the phase-in period of the rule. Additionally, MPCA's costs to issue Part 70 permits during that time would be approximately $42 million each year. The Agency projects that because budget constraints limit the MPCA's ability to hire the staff that would be needed to process the upsurge in GHG permit applications, the large number of applications could result in a backlog that would be "extremely difficult to overcome."[64]

(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

56. In the proposed rules, the Agency aligns Minnesota's standards on air emissions permitting and stationary spark-ignition internal combustion engines, with the applicable federal rules.[65]

57. Likewise, this approach is shared amongst the Midwestern states that comprise the Environmental Protection Agency Region 5.[66]

58. The Administrative Law Judge finds that the Agency has met its special obligations under Minn. Stat. § 116.07, subdivision 2 (f) as to assessing the impact of the proposed rules and the approaches taken by neighboring states.

2. Performance-Based Regulation

59. The Administrative Procedure Act[67] also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[68]

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[64] *Id.,* at 11 (SONAR).

[65] *Id.,* at 11 – 14 (SONAR).

[66] *See, id*.

[67] Minn. Stat. § 14.131.

[68] Minn. Stat. § 14.002.

60. The proposed rules include clarified language so that: (a) potential sources may better avoid the costs of obtaining an emissions permit when such a permit is not legally required; (b) existing permit holders can better access the "administrative amendment process" for minor changes to permit terms; and (c) streamline the permit application process in cases where "the rate of compliance will not be adversely affected."[69]

3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)

61. As required by Minn. Stat. § 14.131, by letter dated August 21, 2012, the Commissioner of Minnesota Management and Budget (MMB) responded to a request by the Agency to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed the Agency's proposed rules and concluded that: "minimal fiscal impact upon local units of government."[70]

62. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

4. Cost to Small Businesses and Cities under Minn. Stat. § 14.127

63. Minn. Stat. § 14.127, requires the Agency to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[71]

64. The Agency determined that it was "unlikely" that the cost of complying with the proposed rule changes will not exceed $25,000 for any business or any statutory or home rule charter city. Additionally, in the unlikely event that the operation of a small business obliged it to obtain a Part 70 permit, that obligation would arise under federal law and not due to any regulatory choices made in the first instance by the MPCA.[72]

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[69] Ex. 3 at 18 – 38 (SONAR).

[70] Ex. 11.

[71] Minn. Stat. § 14.127, subds. 1 and 2.

[72] Ex. 3 at 17 – 18 (SONAR); Minn. Stat. § 14.127, subd. 3 (legislative approval of proposed regulations is not required "if the administrative law judge approves an agency's determination that the rule has been proposed pursuant to a specific federal statutory or regulatory mandate").

65. The Administrative Law Judge finds that the Agency has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

5. Adoption or Amendment of Local Ordinances

66. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[73]

67. The Agency concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Agency's proposed rule should not require local governments to adopt or amend those more general ordinances and regulations.[74]

68. The Administrative Law Judge finds that the Agency has made the determination required by Minn. Stat. § 14.128 and approves that determination.

IV. Rulemaking Legal Standards

69. The Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.[75]

70. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,[76] "legislative facts" (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),[77] and the agency's interpretation of related statutes.[78]

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[73] Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.

[74] Ex. 3 at 16 – 17 (SONAR).

[75] *See,* Minn. R. 1400.2100.

[76] *See, Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

[77] *Compare generally, United States* v. *Gould,* 536 F.2d 216, 220 (8th Cir. 1976).

[78] *See, Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

71. A proposed rule is reasonable if the agency can "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[79] By contrast, a proposed rule will be deemed arbitrary and capricious where the agency's choice is based upon whim, devoid of articulated reasons or "represents its will and not its judgment."[80]

72. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.[81] Thus, while reasonable minds might differ as to whether one or another particular approach represents "the best alternative," the agency's selection will be approved if it is one that a rational person could have made.[82]

73. Because both the Agency and the Administrative Law Judge suggest changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

> "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;"
>
> the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice;" and
>
> the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question."

74. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

> whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;"
>
> whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing;" and

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[79] *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

[80] *See, Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).

[81] *Peterson v. Minn. Dep't of Labor & Indus*., 591 N.W.2d 76, 78 (Minn. App. 1999).

[82] *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."

V. Rule by Rule Analysis

75. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Agency's regulatory choice or otherwise requires closer examination.

76. The Administrative Law Judge finds that the Agency has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

77. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

A. Minn. R. 7007.1450 – Minor and Moderate Permit Amendments

78. In its proposed rules, the MPCA provided that if there were future regulatory changes under which sources that are now defined as "insignificant activities," no longer qualified for this status, the owner or operator of the source would apply for a modification of the applicable permit within 30 days of the effective date of the regulatory change.[83]

79. Several stakeholders complained that a 30-day time period was too short a time to respond to such regulatory changes. Asserting that it would take longer than 30 days from the effective date of a new regulation to assess the impact of the regulation and to submit a sufficiently detailed application in support of the requested permit amendment, these stakeholders urged the MPCA to extend the time for compliance.[84]

80. Agreeing, the MPCA now proposes to require such applications within 120 days of the regulatory change that disqualifies an "insignificant activity."[85]

81. The change from a 30-day time period, to a 120-day period, is supported by several permit holders[86] and conforms the state rule on permit amendments to the corresponding federal rule.[87]

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[83] *See,* Ex. 2 at 60 – 61; Ex. 3 at 36 – 37 (SONAR).

[84] *See,* Ex. 8; *Hearing Transcript*, at 29.

[85] *See, Hearing Transcript*, at 29.

[86] *See, e.g.* Post-Hearing Comments of Minnesota Chamber of Commerce.

[87] *See,* 40 C.F.R. §§ 71.23 (a) and 71.24 (b)(1)(1) (2012).

82. The Agency's action revising the text is needed and reasonable and would not be a substantial change from the rule as originally proposed.

V. Additional Actions Urged By Stakeholders

83. During the August 30, 2012 rulemaking hearing, and thereafter during the public comment periods, there were two principal critiques of the proposed rule: (1) the proposed rules did not closely conform to the goals and objectives of earlier statutes on reducing the level of greenhouse gas emissions; and (2) the rule is unreasonable because there are other, better TPY thresholds than the ones selected by the MPCA. Each of these critiques is addressed below.

A. Better Conformance with the Next Generation Energy Act, Minnesota's Energy Conservation and Renewable Energy Goals and Sustainable Buildings 2030 Act

84. A number of commentators noted that in 2007, Minnesota set as a goal a reduction in the base level amount of greenhouse gas emissions in the state of 15 percent by 2015, and 30 percent by 2050. These commentators assert that adoption of the TPY thresholds in the federal "tailoring rule" will frustrate attainment of these goals.[88]

85. Similarly, these commentators assert that Minnesota will be unable to fulfill the commitments it has made under the Sustainable Buildings 2030 Act[89] or under the state's Energy Conservation and Renewable Energy goals,[90] if the federal TPY thresholds are incorporated into Minnesota Rules.[91]

86. As the Agency pointed out at the hearing, and in later comments, the Next Generation Energy Act establishes a series of required assessments, estimates, recommendations and plans, but it does not establish – or prohibit – a particular TPY threshold for emission permits. It is possible to read the provisions of Next Generation Energy Act of 2007 harmoniously alongside the proposed rules.[92]

87. Neither the Sustainable Buildings 2030 Act nor the state's Energy Conservation and Renewable Energy goals restrict the MPCA's authority to adopt particular TPY emission thresholds. The Sustainable Buildings 2030 Act obliges state officials to develop design guidelines for building and renovation projects that will permit such projects to "exceed the state energy code ... by at least 30 percent" and

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[88] *Compare, e.g.,* Comments of Carol Overland (September 19 and September 26, 2012) and Comments of Ken Pentel (September 19, 2012) with Minn. Stat. § 216H.02.

[89] Minn. Stat. § 16B.325.

[90] Minn. Stat. §§ 216C.05 — 216C.053.

[91] *See, e.g.,* Comments of Kurt Kimber (September 19, 2012).

[92] *See generally,* Minn. Stat. §§ 645.39 ("a later law shall not be construed to repeal an earlier law unless the two laws are irreconcilable).

"encourage continual energy conservation improvements in new buildings and major renovations." Further, the state has set goals for reduction in the per capita consumption of fossil fuel and increased reliance on energy generated from renewable resources. These statutes do not establish – or prohibit – a particular TPY threshold for emission permits. They also do not restrict the MPCA's authority to adopt particular TPY emission thresholds. It is possible to read the requirements of these statutes harmoniously alongside the proposed rules.

B. Selection of Other TPY Thresholds

88. A number commentators argued that if the GHG permit threshold were set at some interval between 100 TPY, and the proposed 100,000 TPY, better progress could be made to eliminating greenhouse gas emissions and improving overall public health and safety.[93]

89. The role of the Administrative Law Judge during a legal review of rules is not to fashion requirements that the judge regards as best suited for the regulatory purpose; but rather, to determine whether the Agency has made a reasonable selection among the regulatory options it had.[94] The delegation of rulemaking authority is from the Minnesota Legislature to the Agency; and not to the Judge. In this instance, the MPCA's selection of TPY thresholds that conform to the federal standard, rely upon the broad inquiry and review conducted by the EPA in developing those rules and align to the permitting standards adopted by adjacent states,[95] are needed and reasonable.

VI. Recommended Technical Corrections

A. Minn R. 7007.0100, subp. 24a

90. The Administrative Law Judge recommends two technical changes to the proposed rules. A technical correction is not a defect in the proposed rule; but rather a recommendation that the agency may adopt, if it sees fit, so as to aid in the administration of the rule.

91. The Administrative Law Judge recommends editorial changes in the definition of the term "Subject to regulation" so as to make the proposed rule clearer and easier to read. The first sentence of proposed Minn R. 7007.0100, subp. 24a should be revised to read:

"Subject to regulation" means a pollutant that is:

(a) subject to a provision of the Clean Air Act;

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[93] *See, e.g.,* Comments of Paul Densmore (September 12, 2012); Comments of Alan Muller (September 26, 2012) and Comments of John Schmid (September 19, 2012).

[94] *See,* Finding 72, *supra*.

[95] *See,* Agency Reply Comments, at 2 (September 26, 2012); 75 *Federal Register* 31569-71.

(b) subject to a nationally applicable regulation codified by the Administrator in the Code of Federal Regulations, Title 40, Chapter I, Subchapter C (Air Programs) that requires actual control of the quantity of emissions of that pollutant and the control requirement has taken effect to control, limit or restrict the quantity of emissions of that pollutant released from the regulated activity;

(c) a greenhouse gas from a stationary source that emits 100,000 tons per year (tpy) CO_2 equivalent emissions; or,

(d) a greenhouse gas from a stationary source that has the potential to emit 100,000 tons per year (tpy) CO_2 equivalent emissions.

92. The change recommended above is needed and reasonable and would not be a substantial change from the rules as proposed.

B. Minn R. 7007.0150, subp. 1 (B) (1)

93. The Administrative Law Judge recommends deletion of the phrase "This assessment was due by July 1, 2011, under temporary rules adopted on January 24, 2011 …." While this statement is undoubtedly true, it does not qualify as a rule. It is not an "agency statement of general applicability and future effect."[96]

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Pollution Control Agency gave notice to interested persons in this matter.

2. Except as noted in Findings 32, 33, 34, 35 and 43, the Agency has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule. The Administrative Law Judge concludes that the cited omission is a harmless error under Minn. Stat. § 14.15, subd. 5.

3. The Administrative Law Judge concludes that the Agency has fulfilled its additional notice requirements.

4. The Agency has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

[96] Minn. Stat. § 14.02, subd. 4 ("'Rule' means every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure").

5. The Notice of Hearing, the proposed rules and Statement of Need and Reasonableness (SONAR) complied with Minn. R. 1400.2080, subp. 5.

6. The Agency has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.

7. The modification to the proposed rules suggested by the Agency after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

8. The modifications to the proposed rules suggested by the Administrative Law Judge after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

9. As part of the public comment process, a number of stakeholders urged the Agency to adopt other revisions to Part 7007. In each instance, the Agency's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

10. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Agency from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated: November 9, 2012

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: 2 Transcripts.

NOTICE

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt the final rules or modify or withdraw its proposed rule. If the agency makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.